**Ryder Student Transportation Services, Inc.** ***and*** **Louis Tritschler.** Case 17–CA–20128

October 1, 2001

DECISION AND ORDER

BY CHAIRMAN HURTGEN, AND MEMBERS LIEBMAN AND TRUESDALE

On February 1, 2000, Administrative Law Judge William N. Cates issued the attached bench decision. The Respondent filed exceptions and a supporting brief and the General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions[1] and to adopt the recommended Order as modified below.[2]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Ryder Student Transportation Services, Inc., Columbia, Missouri, its officers, agents, successors, and assigns shall take the action set forth in the Order as modified.

1. Insert the following as paragraph 2(b) and reletter the subsequent paragraphs.

"(b) Make Louis Tritschler whole for any losses suffered as a result of the discrimination against him, with interest."

2. Substitute the following for relettered paragraph 2(d)

"(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order."

3. Substitute the attached notice for that of the administrative law judge.

APPENDIX B

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT interrogate employees about their union or other protected-concerted activities.

WE WILL NOT discharge employees for engaging in concerted protected or union activities.

WE WILL NOT in any like or related manner interfere with, restrain or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, within 14 days from the date of this Order, offer Louis Tritschler full reinstatement to his former job, or if his job no longer exists to a substantially equivalent job without prejudice to his seniority or other rights or privileges previously enjoyed.

WE WILL make Louis Tritschler whole for any losses suffered as a result of the discrimination against him, plus interest.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to his unlawful discharge, and within 3 days thereafter, notify Louis

[1] In adopting the judge's finding that the Respondent violated Sec. 8(a)(1) and (3) of the Act by interrogating Louis Tritschler and discharging him because he engaged in union or protected concerted activity, we adopt the judge's findings that Tritschler was a rank-and-file employee and not a supervisor, manager, or confidential employee. In view of these findings, we find it unnecessary to consider the extent to which the protections of the Act extend to confidential employees. *E & L Transport Co*., 315 NLRB 303, 304 fn. 11 (1994).

We also agree with the judge that the evidence failed to establish that Tritschler was an agent of the Respondent. Finally, we find it unnecessary to pass on the judge's additional finding that Tritschler was not a professional employee because such a finding would not preclude Tritschler from the protection of the Act.

On the issue of agency status, Chairman Hurtgen agrees with the judge and his colleagues that the evidence fails to establish that Tritschler was an agent of the Respondent. Further, in the Chairman's view, where an employer places an employee in a situation in which fellow employees would reasonably regard him as an agent, the Board can find that he is an agent of the employer. In the instant case, the Respondent did not place Tritschler in such a situation. Indeed, the Respondent did not even know that Tritschler was going to attend the meeting. Thus, there is no prospect that Tritschler could bind the Respondent by his conduct at the meeting. Accordingly, the Respondent had no reason to question Tritschler about his conduct at the meeting, or to discharge him therefor.

[2] We will modify the judge's recommended Order in accordance with our recent decision in *Ferguson Electric Co*., 335 NLRB 142 (2001). We have also added make-whole language to the judge's recommended Order.

Tritschler, in writing that this has been done and his discharge will not be used him in any way.

RYDER STUDENT TRANSPORTATION SERVICES, INC.

*Stanley D. Williams, Esq*., for the General Counsel.
*Lawrence McDonald,* Director Labor Relations for the Company.
*Louis Tritschler,* Pro Se.

BENCH DECISION

STATEMENT OF THE CASE

WILLIAM N. CATES, Administrative Law Judge. This is an unfair labor practice case prosecuted by the National Labor Relations Board's (Board) General Counsel acting through the Regional Director for Region 17 of the Board following an investigation by Region 17's staff. The Regional Director for Region 17 of the Board issued a complaint and notice of hearing (complaint) on June 29, 1999, against Ryder Student Transportation Services, Inc. (Company or Respondent), based on an unfair labor practice charge filed on April 19, 1999, and amended on June 29, 1999, by Louis Tritschler, an individual (Tritschler). At the close of a 1-day trial in Columbia, Missouri, on January 11, 2000, I rendered a bench decision in favor of the General Counsel (Government) thereby finding a violation of 29 U.S.C. 158(a)(1) and (3). This certification of that bench decision, along with the Order, which appears below, triggers the time period for filing an appeal (exceptions) to the National Labor Relations Board. I rendered the bench decision pursuant to Section 102.35(a)(10) of the National Labor Relations Board's (Board) Rules and Regulations.

For the reasons stated by me on the record at the close of the trial, and by virtue of the prima facie case established by the Government, a case not credibly rebutted by the Respondent, I found the Respondent violated Section 8(a)(1) of the National Labor Relations Act, as amended (Act), when on April 9, 1999, it interrogated an employee regarding his union sympathies and desires. Additionally, I found the Company also violated Section 8(a)(3) and (1) of the Act when on April 9, 1999; it discharged its employee Tritschler because he engaged in union and/or concerted protected activities and/or to discourage employees from engaging in such activities. I rejected the Respondent's contention it lawfully discharged Tritschler because he was a confidential employee and/or a supervisor or management agent of the Respondent. *Wright Line,* 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); approved in *NLRB v. Transportation Management* Corp., 462 U.S. 393 (1983).

I certify the accuracy of the portion of the transcript, as corrected,[1] pages 139 to 167, containing my bench decision, and I attach a copy of that portion of the transcript, as corrected, as "Appendix A."

I set forth conclusions of law and an appropriate remedy in the body of my bench decision and on those conclusions of law, and on the entire record, I issue the following recommended[2]

ORDER

The Company, Ryder Student Transportation Services, Inc., its officers, agents, successors and assigns shall

1. Cease and desist from

(a) Interrogating employees about their union or other protected concerted activities.

(b) Discharging employees because of their union sympathies or concerted activities and/or to discourage employees from engaging in these activities.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Tritschler full reinstatement to his former job or, if his former job no longer exists, to a substantially equivalent job without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Within 14 days from the date of this Order remove from its files any reference to the unlawful discharge and, within 3 days thereafter, notify Tritschler, in writing that this has been done and his discharge will not be used against him in any way.

(c) Preserve, and within 14 days of a request, make available to the Board or its agents, for its examination and copying, all payroll records, Social Security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of the records if stored in electronic form, necessary to analyze the amount of any backpay due under the terms of this Order.

(d) Within 14 days after service by the Regional Director of Region 17 of the National Labor Relations Board, post at its Columbia, Missouri facility copies of the attached notice marked "Appendix B"[3] Copies of the notice, on forms provided by the Regional Director for Region 17 after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices are customarily posted. Reasonable steps shall be taken to ensure the notices are not altered, defaced, or covered by any other material. In the event that during the pendency of these proceedings the Company has gone out of business or closed the facility involved in these proceedings, the Company shall duplicate and mail, at its own expense, a copy of the notice, to all employees

[1] I have corrected the transcript pages containing my decision and the corrections are as reflected in attached appendix C [omitted from publication].

[2] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[3] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

employed by the Company on or at any time since April 6, 1999.

(e) Within 21 days after service by the Region, file with the Regional Director for Region 17 of the National Labor Relations Board sworn certification of a responsible official on a form provided by the Region attesting to the steps the Company has taken to comply.

APPENDIX A

**139**

BENCH DECISION

JUDGE CATES: First let me thank the parties for the presentation of the evidence, both of you are a credit to the party and interest you represent. If you will reflect back over the trial I have not asked any questions I don't think, and when the presiding Judge does not have to ask any questions that is a good indication that the parties have developed the evidence fully and completely and I thank you for that.

This is an unfair labor practice case prosecuted by the

**140**

National Labor Relations Board's General Counsel acting through the Regional Director for Region 17 of the Board following an investigation by Region 17's staff.

The Regional Director for Region 17 of the Board issued a Complaint and Notice of Hearing on June 29, 1999, against Ryder Student Transportation Services, Inc., hereinafter the Company, based on an unfair labor practice charge filed on April 19, 1999, and amended on June 29, 1999 by Louis Tritschler, an individual, hereinafter Tritschler.

Specifically the Complaint alleges the Company on or about April 9, 1999, interrogated employees about their Union or other protected concerted activities in violation of Section 8(a)(1) of the National Labor Relations Act as amended, hereinafter Act.

It is also alleged the Company on April 9, 1999, discharged its employee Tritschler because he formed, joined and assisted International Brotherhood of Teamsters Local No. 833, hereinafter Union, and or engaged in concerted activities and to discourage employees from engaging in these activities.

It is alleged Tritschler's discharge by the Company violated Section 8(a)(3) and (1) of the Act. In its answer to the complaint as well as admissions made here at trial the Company admits the Board's jurisdiction is properly invoked and that the Union is a Labor Organization within the meaning of the Act.

The Company denies violating the Act in any manner set forth in the Complaint. The Company is a Corporation with an

**141**

office and place of business located in Columbia, Missouri where it is engaged in providing school bus services.

The Company in conducting its business operations purchased and received during the twelve month period ending April 30, 1999, which is a representative period, at its facility goods valued in excess of fifty thousand dollars directly from points outside the State of Missouri.

The evidence establishes, the parties admit and I find the Company is an Employer engaged in commerce within the meaning of section 2(2), 6(7) of the Act. The evidence establishes, and I find that the Union is a Labor Organization within the meaning of section 2(5) of the Act.

The evidence established and I find that at material times herein Company contract Manager Mike Thompson, hereinafter Manager Thompson, Director of Operations David Duke, hereinafter Director of Operations Duke, and Director of Labor Relations McDonald, hereinafter Director of Labor Relations McDonald, are Supervisors and or Agents of the Company within the meaning of section 2(11) and 2(13) of the Act.

This case specifically involves the employment of Tritschler. Tritschler was hired in mid August, 1998, as a part time bus driver at a pay rate of approximately seven dollars and eighty five cents an hour. He was hired following a job fair seeking drivers in the local area by the Company. Tritschler was assigned to a particular route, which in this

**142**

case was route 102A, which went approximately to Hickmont High school, Hickmont Jr. school and then to a middle school. He was paid on an hourly rate and clocked in and out of the job by simply swiping a card through a card machine that indicated when he entered and left work.

Tritschler was also employed by a separate Employer at the same time. After a period of time Tritschler was in a position to leave the Company and work full time at another uninvolved and unrelated Employer.

The Company at that time offered Tritschler a different job in which he could stop driving on a full time basis and become the Routing Coordinator at a pay scale of approximately ten dollars an hour. This took place in approximately the January, February time frame of 1999.

Tritschler accepted the Company's offer and assumed those duties and functions. He was performing those duties and functions at the time of his separation from the Company on or about April 9, 1999.

Before I go into the specific job performance, functions and duties of Tritschler I believe it would be appropriate to notice for the record certain undisputed and stipulated facts as they will blend their way into the decision as it is delivered.

On March 24, 1999, the Union filed a Petition in case 17-RC-11728 for certification in an appropriate bargaining unit

**143**

described as "All regular full time and part time route drivers, substitute drivers, charter drivers and safety trainers employed by the company in columbia, missouri, excluding guards, office clerical employees and supervisors as defined in the Act."

On April 7, 1999 the Acting Regional Director for Region 17 of the Board approved a Stipulated Election Agreement to conduct an election in the following unit, "All drivers employed by the Company from its facility located at 3511 Clark Lane, Columbia, Missouri, but excluding district clerical employees, professional employees, mechanics, guards and supervisors as defined by the Act."

On April 23, 1999, the Board conducted a secret ballot election pursuant to the Stipulated Election Agreement and on May

4, 1999, the Regional Director for Region 17 of the Board issued a certification of results in case 17–RC–1728.

It is against that admitted and stipulated set of background facts that it is now appropriate to review the job duties Tritschler performed as the Routing Coordinator for the Company.

Tritschler testified that he entered data into a computer base that involved certain geographic mapping programs for Boone County, Missouri which is the County in which Columbia, Missouri is located. He entered such information as the students name, address, ID number, the age and school where the individual would attend, what grade the individual was in and any special

**144**

needs relative to the particular student that might be needed to be noted in the computer system.

Once such information was presented into the computer the computer would generate then automatically bus routes that would be most favorable to time, geography and location to the school or place where the individual was to be picked up and delivered.

Tritschler testified that in his capacity as the Routing Coordinator he received full time employee benefits. In addition to his hourly wage rate of ten dollars an hour he received better insurance with his describing better insurance as the Company paid more or all of the premium, that he obtained sick leave and vacation leave.

Tritschler testified that no employees reported to him, he rated no employees, he neither hired, fired nor interviewed any employees nor did he discipline employees. Management did not seek his opinion to hire, fire or discipline employees. He was never evaluated himself and was never involved in evaluating any employees.

Tritschler in his capacity did not set any wage rates, he could not expend Company funds, extend Company credit, negotiate contracts for the Company, extend credit to anyone for the Company nor did he institute, establish or police any personnel policies.

In his capacity as the Routing Coordinator drivers would come to him in his office, which was an open cubicle area, to

**145**

discuss such matters as not being able to turn a bus on a street, the bus was too long, there was obstructions in the way. Tritschler testified he had the authority to move the route one street over or set it in a different direction to avoid the complicating problem of a street being too short for a driver to turn the bus on or an obstruction being in the way. But beyond that any other changes would have to be made by the Contract Manager, which at applicable times herein was Contract Manager Thompson.

Tritschler testified he did from time to time have contact with the school District Contract person, a Whitesides who was the Director of Transportation for the Public School System for which the students were being transported by the Company herein.

His contact or involvement with the Director of Transportation for the Public School System would, could and did involve such matters as whether a student lived within one mile of the school that the student was designated to attend. Tritschler testified that if the student lived one mile or less from the school they were designated to attend that student was not entitled to free transportation pursuant to the contract between the Company and the Public School System.

If his computer notified him after entering a students address and the computer formulating that to the map established in the computer indicated that the child was living one mile or

**146**

closer to the school system he would communicate such to the Director of Transportation for the Public School System and he would also send the parent a letter notifying the parent that their child was living closer than the distance allowed for the free transportation from the Company herein.

Also, Tritschler testified the contact with the Director of Transportation for the Public School System Whitesides might also involve where a student had more than one address in the system and it would need to be ascertained which was the correct address and then further whether those address's as corrected would place the student in the category suppose to be receiving free transportation or outside that group.

Tritschler testified his office area where his desk and computer were was at the end of the building in which they were housed and he could see most people coming and leaving as well as they could see him as they came and left from the facility.

Tritschler testified that the computer at his desk at which he worked was served by a file server that was maintained by the Company. He indicated that there was payroll record information and personnel information on the file server. He testified however that one could not access the payroll information without having a password to get into the system where the payroll and or personnel records were maintained.

**147**

Tritschler testified he was an experienced computer operator who had been school trained and he believed he could access the information through his expertise, stated differently he believed he was sufficiently trained to break into, or I think the terminology in the computer world is hack into the system where such information was contained.

As previously noted from the background information of the Union's filing a Petition for certain employees of the Company herein in March of 1999, the Company on April 6, 1999, conducted a meeting of management and staff personnel at a local restaurant in Columbia, Missouri, the restaurant in case being the Bob Evans Restaurant.

Those attending that meeting were Director of Labor Relations McDonald, Director of Operations Duke, Regional Manager Lowrey, Contract Manager in Columbia, Missouri, the facility involved herein Thompson, the Jefferson City, Missouri Contract Manager Lois Thompson, Operations Clerk Apperson, Safety Coordinator Jones, Dispatcher Ramirez, Dispatcher Copeland, Dispatcher Westbrook and Routing Coordinator Tritschler.

Those individuals attended an approximately two hour meeting at the restaurant on that evening. The evidence tends to indicate that Director of Labor Relations McDonald was in

**148**

charge of and conducted the meeting.

Director of Labor Relations McDonald explained to the management and staff personnel that they were in a Union campaign and that there were certain things that they could and could not do.

Director of Labor Relations McDonald informed the employees about the TIPS, that they could not threaten employees, they could not interrogate employees, they could not promise benefits to employees and they could not surveil employees.

Director of Labor Relations McDonald indicated to the other persons present that they were the front line of the Company's campaign, that they were to listen to what the employees, specifically the drivers, had to say and if they had questions of a simply nature they could answer they were to do so, but if the questions involved policy or to matters that they could not explain they were to bring those matters to higher management's attention, specifically Contract Manager Thompson's attention or Director of Operations Duke or even Director of Labor Relations McDonald himself.

It appears that one of the subject matters among others that may well have been discussed at the April 6, 1999, meeting at the restaurant was that the drivers were concerned about the restrooms or lack of restrooms at the building that the Company was utilizing in Columbia, Missouri, a building that was

**149**

provided to the Company free of charge in exchange for some twenty six or so kindergarten bus routes being provided by the Company free. In other words it was not really a free building for use by the Company, it was that the Company was willing to provide approximately twenty six bus routes free and they in turn could use the building. The Company did not own the building.

It appears from the testimony of Tritschler that it was noted that there were approximately a hundred and forty five employees with only one women's restroom with one seat and only one men's restroom with one seat and one urinal, and that employees at the beginning of the day or at the end of the day would have to stand in line for use at this one restroom facility and that this was very distracting to the drivers.

According to the testimony of Director of Operations Duke was specifically pointed out to those present that they should not engage in any surveillance of the activities that might be taking place for the Union because they did not want to place the Company in a position of committing or being accused of committing any unfair labor practices or to provide any basis for overturning any election, that is overturning the results of an election that it was certain to be held.

Also issues that Director of Operations Duke considered of a proprietary nature were discussed that evening, matters were discussed such as that the Company was intending to give a pay

**150**

raise to the employees but they could not mention it at this time because they had no paper trail or no documentation to show that they had been contemplating or anticipating providing the drivers a pay increase and they could not mention it at this time because they could not support their contention by paper work, that it had been in the works before the union election or the union campaign came on the scene.

Specifically, according to Director of Operations Duke, those present were encouraged to listen and to understand what was going on but not to ask questions that would be of a prohibited nature.

Director of Operations Duke also testified it was clear to everyone at the management, staff meeting, that the Company was relying on them in the campaign, in the campaign of the Company against the Union.

According to Director of Operations Duke and others those present at the April 6th meeting had an opportunity to ask questions and some did. However, it does not appear that Tritschler asked questions. The meeting, after approximately two hours, disbanded.

According to the testimony of Director of Operations Duke, Tritschler remained if not for all of the meeting, essentially all of the meeting.

On April the 7th, the next day, there was a Union meeting at the Carpenters Union Hall in Columbia, Missouri.

**151**

Approximately fifteen to twenty Company employees were present. Among those present was Tritschler and his wife Barbara Tritschler who is employed by the Company, or at least was during applicable times herein, as a bus driver.

At the Union meeting Tritschler testified that he sat near the back of the facility sort of away from the others and was listening to the discussion until it became apparent that the drivers were very upset about the bathroom situation at the Company facility.

Tritschler testified that he at that point, after having heard it raised several times, informed the employees that the Company couldn't do anything about the restroom situation at the facility because the Company did not own the building, that they merely had use of the building because they provided certain routes free for the system in exchange for the use of the building.

Tritschler testified he knew of that set up, the exchange for use of a building for bus routes before he had attended the April 6th meeting of the Company and that it was a matter of public record in the contract between the Company and the school System.

The Union meeting ended, this record is not clear whether Tritschler remained for the entire meeting or not. On April the 9th it is undisputed that Tritschler was discharged by the Company.

**152**

Tritschler testified he was called into the Contract Manager's office and asked by Contract Manager Thompson if he had attended the Union meeting on April the 7th. Tritschler told

Contract Manager Thompson he had. Thompson asked him if he had spoken at the meeting and he informed Contract Manager Thompson that he had and told him what was said.

Tritschler testified Thompson told him he had no choice but to terminate him, the decision had come from Director of Operations Duke. Tritschler testified he was shocked at the decision and was told that he could call at 9:00 a.m. the next day and speak with Director of Operations Duke.

Tritschler testified that he went to Contract Manager Thompson's office on or about April the 12th, tried to get in contact with Director of Operations Duke, finally spoke with others, specifically Gary Anderson who told him that he would check into it, and was later advised that the conduct he had engaged in by attending and speaking at the union meeting could interfere with the election and as such he had been discharged.

Director of Operations Duke testified that he personally made the decision to discharge Tritschler and that he did so based on insubordination of Tritschler. The insubordination he (Tritschler) testified was disregarding the directives that he had been given at the April 6th meeting when he attended the April 7th union meeting.

Duke testified that when Tritschler went to the April 7th meeting he put the Company at risk of an unfair labor practice

**153**

allegation or interference with an election. At the time he made the decision to discharge Tritschler, Director of Operations Duke knew that Tritschler, had attended the Union meeting on the 7th and that he had spoken at the Union meeting on the 7th, but he did not know what Tritschler had said at the April 7th Union meeting. Tritschler has not been reinstated since that time.

Those are the essential facts of the case. I do not perceive a credibility conflict, but if it should even be perceived that there is any evidence contrary to what I have just outlined I have not disregarded it, I have simply not relied on it, and by not relying on it I have not considered that it is relevant or trustworthy for reliance.

The Government contends in this case that Tritschler was discharged for attending a Union meeting and speaking at the meeting. The Government contends that such conduct on the part of Tritschler was conduct protected by section 7 of the Act.

The Government further contends that Tritschler is an employee within the meaning of the Act, entitled to its protection and that he is not excluded from the protection of the Act either as a Section 2(11) Supervisor or a Section 2(13) agent or a managerial or confidential employee.

The Government contends that Tritschler is a Data Entry Clerk, nothing more or less, and that he is entitled to the full protection of the Act. That any functions that he performed or

**154**

duties that he carried out that would tend to in any way indicate that he had any Agency, Managerial or Supervisory functions were merely of a perfunctory nature and that he had no independent duties that would remove him from the protection of the Act.

The Company on the other hand contends that this is not a Section 7 rights violation case, that Director of Operations Duke discharged Tritschler for insubordinate conduct. That Tritschler openly disregarded the Company's authority, that he failed to keep confidential the Company's strategy and that he would have been discharged notwithstanding any protected concerted activity on his part.

The Company contends that he is not entitled to any rights beyond those of an employee who was on the Company's management and staff team, that he was entrusted as a professional employee or as an Agent or as a Supervisor and that his conduct constituted insubordination.

The Company contends that it is being provided somewhat of a Hobsons Choice in the case, that if it did nothing to Tritschler that it would subject itself to unfair labor practice allegations of surveilling a Union meeting, and if it does do anything to Tritschler then it is accused of violating the Act.

The Company argues that the Government simply can't have it both ways.

**155**

The Company argues that by Tritschler engaging in what could constitute surveillance of a union meeting that it put the Company in jeopardy by his actions, subjecting them to potential unfair labor practices and or objections to the conduct affecting the result of an election.The Company argues that the Complaint be dismissed.

It is appropriate at this point to highlight rather briefly the causation test that the Board requires be applied in cases such as this. In *Wright Line*, 25-NLRB-1083 (1980), enforced 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB -v- Transportation Management Corp*., 462 U.S. 393 (1983), the Board set forth its causation test for cases alleging violations of the Act that turn, as does the case herein, on employer motivation.

First the Government must persuade the Board that anti Union sentiment was a substantial or motivating factor in the challenged employer conduct or decision. Once this is established the burden then shifts to the Employer to prove its affirmative defense that it would have taken the same action even if its employees had not engaged in protected activity. See *Manno Electric Inc.*, 321 NLRB 278 footnote 12 (1996.)

How does the Government establish its burden? Government Counsel must demonstrate by a preponderance of evidence, one

**156**

that the employee was engaged in protected activity, two, that the Employer was aware of the activity, three, that the activity of the workers Union affiliation was a substantial or motivating reason for the Employer's action, and four there was a causal connection between the Employers animus and its discharge decision.

The Government may meet its Wright Line burden with evidence short of direct evidence of motivation, that is inferential evidence arising from a variety of circumstances such as union animus, timing or pretext, may sustain the Government's burden.

Furthermore, it may be found that for an Employers proffered non discriminatory motivational explanation is false, even

in the absence of motivation the trier of fact may infer unlawful motivation.

Motivation of Union animus may be inferred from the record as a whole where an Employer's proffered explanation is implausible or a combination of factors circumstantially support such inference. Direct evidence of union animus is not required to support such an inference.

In the instant case has the Government met its burden with respect to establishing a prima facie case.

I am persuaded that the Government has established its burden of showing that Tritschler, A, participated in union activities, that is he went to a Union meeting, he spoke at the

**157**

Union meeting. Was the Company aware that Tritschler attended the Union meeting, the answer is yes, there is no dispute.

Did the Company take action against Tritschler as a result of his having attended the Union meeting, the answer again is yes. Director of Operations Duke clearly testified that he was discharged for his actions at that meeting. According to Duke he placed the Company in jeopardy by his attendance.

Was there a causal connection, absolutely, his being there, his speaking brought about his termination. But that does not end the case. The question then turns, has the Company met its burden of establishing that it would have taken the same action even in the absence of the employee having engaged in any protected activity, or was the Company privileged to take the action it did because Tritschler was a confidential employee, a supervisory employee, a managerial employee or a professional employee.

To see whether the Company has met its defense of an affirmative nature the facts must be looked at carefully. First is Tritschler an employee within the meaning of the Act? It is clear that he is and I need not cite authority for his being an employee of the Company.

Secondly, was Tritschler a Supervisor within the meaning of the Act? Section 2(11) of the Act provides as follows, quote, the term Supervisor means any individual having the authority in the interest of the Employer to hire, transfer,

**158**

suspend, lay off, recall, promote, discharge, assign, reward or discipline other employees, responsibility to direct them or to adjust their grievances or to effectively recommend such action. If in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature but requires the use of independent judgment.

Enacting Section 2(11) Congress emphasized its intention that only truly supervisory personnel vested with genuine management prerogatives should be considered supervisors and not straw boss's, lead men, set up men and other minor supervisory employees.

The status of Supervisor under the Act is determined by an individuals duties, not by his or her title or job classification. It is well settled that an employee can not be transformed into a Supervisor merely by vesting of a title and theoretical power to perform one or more of the enumerated functions in Section 2(11) of the Act.

To qualify as a supervisor it is not necessary that an individual possess all of these powers, rather possession of any one of them is sufficient to confer supervisory status.

However, consistent with the statutory language and legislative intent it is well recognized that Section 2(11)'s disjunctive listing of supervisory indicia does not alter the essential conjunctive requirement that a supervisor must exercise independent judgment in performing the enumerated

**159**

functions.

Applying these principles of law to the instant case I find that the Company has not established that Tritschler was a supervisor within the meaning of the Act. And by the way the burden of establishing supervisory status is on the party advocating it, and in this case it is the Company that is advocating a supervisory status.

The work performed by Tritschler was merely of a routine nature, taking information that is provided to him by the Company from the school system, which provides the name, address, age, school, location, home location of the students who will be riding or potentially riding the Company's bus system.

That information is merely fed into a computer and once in there the computer by its own program generates the map or the route that the drivers will follow in picking up the various students. I find that his performance in that function is nothing more than a routine clerical performance.

Also, his generating and issuing letters to parents and others indicating that a student is inside or outside of the free transportation provided by the Company pursuant to its contract with the school System is again information that is of a routine nature and fed into the computer and the computer generates whether the student lives within the prescribed distance that precludes them from riding free or not. And then

**160**

a letter is sent to the parents advising them that they live in an area that does not afford them free transportation to school and advises them they can purchase that transportation from the Company.

The letter, in this case certain copies of which were in evidence such as Company Exhibit No. 5 and Company Exhibit No. 3 I believe it was, that was sent out over the signature of Tritschler, were nothing more than a draft letter that he had prepared that was approved by Contract Manager Thompson and simply notified the parent of the child of the status of the child based on the street address of the child.

Also the correspondence created and generated by Tritschler with respect to matters of concerns to routes that the buses would follow again were generated as a result of routine information being placed into the computer system and the computer by its program providing that information.

As I enumerated in the factual analysis earlier set forth there is no evidence that Tritschler engaged in any of the more traditional indicia of supervisory status such as hiring and firing employees, the disciplining of employees, instructing employees on how to perform their job, directing employees in performing their jobs, he simply performed none of those functions.

I find that he is not a supervisor within the meaning of Section 2(11) of the Act.

**161**

The Company contends also that Tritschler was a confidential employee or that he had access to confidential information and as such he should be precluded from the protection of the Act as a confidential employee.

I find that Tritschler does not qualify as a confidential employee within the very strict guidelines that the Board has adopted with respect to confidential employees, and as the Supreme Court has further approved in *NLRB -v- Hendrix County Rural Electric Membership Corp.,* 454 U.S. 170 at 189 (1981). The Court endorsed the Board's definition that employees in a position with a labor nexus that assists and acts in a confidential capacity to persons who formulate, determine and effectuate management policies in the field of labor relations are only those that would constitute confidential employees.

There is no evidence in this record that Tritschler engaged in any such conduct where he assisted in a confidential nature anyone from management who was formulating and effecting management policies in the field of labor relations.

I reject the Company's contention that his attendance at the management, staff meeting on April the 6th placed him in a position where he was privy to confidential information of the Company and that he could not reveal that kept confidential information because he and the others there were the front line of the Company's campaign against the Union.

First off the Company cannot make him a confidential

**162**

employee by simply asserting that he is their front line person with respect to its campaign involving the Union.

Secondly assuming for the sake of discussion that any confidential information had been revealed at that meeting the discharge decision was made without ever knowing whether anything that was asked to be confidential was revealed by Tritschler at the union meeting.

I further reject the Company's contention that Tritschler had access via the computer to confidential labor relations information. First, the information of that nature, based on the undisputed testimony of Tritschler, was accessible only by having an access code that would allow one to enter payroll data or allow one to enter personnel data or allow one to enter other such related documents.

The Company attempted to demonstrate that Tritschler had the computer expertise to hack his way into the system or break his way into the system and therefor he had access to confidential information.

I reject such a contention for this reason, the mere fact that the company's security system on its records is not sufficient to protect itself against those that it does not wish to have access to, does not make Tritschler a confidential employee even if he has the capability to work his way around the access codes. It would be similar to saying that we put the file cabinets with our records in a room and we used a weak lock

**163**

and therefor anyone could have picked the lock and gone in. To do that does not make an individual a confidential employee because they can pick the lock or hack their way into what the Company would contend were confidential information.

The Company also contends, and I reject its contention, that it has established that Tritschler was either an agent of the Company or he had placed himself in a position such as to hold himself out as an agent of the Company.

The Company in that regard points to among other things the correspondence that was sent to certain parents of students who were transported by the Company as well as certain to whom it may concern memos or bulletins that Tritschler prepared and executed.

Again, the correspondence, as I earlier indicated, such as Company 3 or Company 2, were both documents that were prepared by Tritschler but approved by Contract Manager Thompson and were generated by computer provided information from the programs that were in the system such as notifying a parent that a student lived too close to the school System to be provided free transportation or that effective immediately a certain bus would stop at one location, remain for -x- number of minutes before moving to another location.

**164**

These are all matters of a routine nature and do not rise to the level of establishing that Tritschler was either an agent of held himself out to be an agent of the Company either with the general public, with drivers or with fellow staff members.

I find that he was not an Agent within the meaning of Section 2(13) of the Act nor had he held himself out to be an Agent within the meaning of Section 2(13) of the Act.

Was Tritschler a professional employee such as would preclude his protection in this case, and there is no evidence in this record to establish or qualify Tritschler as a professional employee.

I find that the Company's defense's are without merit and that the Company in its discharge of Tritschler violated Section 8(a)(3) and (1) of the Act.

Now we go back to the April 9th encounter with Tritschler and the Company is asking him if he had been to the Union meeting and if he had spoken at the Union meeting, does that constitute interrogation within the meaning of Section 8(a)(1) of the Act? Interrogation is not by itself a per se violation of Section 8(a)(1) of the Act.

The test for determining the legality of employee interrogation regarding union sympathy or activities is whether under all the circumstances the interrogation reasonably tends to restrain or interfere with employees in the exercise of their statutory rights. *Matthew ReadyMix, Inc*., 324 NLRB 1005

**165**

at 1007 (1997).

Under this totality of circumstances approached such factors as whether the interrogated employee was an open or active supporter of the Union, the background surrounding the interrogation, the nature and purpose of the information sought, the

identity of the questioner and the place and or method of the interrogation are examined.

*Rossmore House Hotel*, 269 NLRB 1176 (1984), enfd. sub nom. *Hotel and Restaurant Employees Union v. NLRB* 760 F.2d 1006 (9th Cir., 1985), and *Bourne Co*. v. NLRB, 332 F.2d 47 (2d Cir., 1994).

Looking at the background surrounding this interrogation and the nature and the purpose for which the information was sought does it constitute unlawful interference such as to constitute a violation of Section 8(a)(1) of the Act? In this particular case I am persuaded it did because I have concluded that he was not a confidential employee, he was not a management or professional employee, he was not an Agent of the Company and therefor he had the right to attend the Union meeting if he chose to, speak at the union meeting and not be questioned about his presence at, or comments made at the meeting.

I find that the Company's conduct violated Section 8(a)(1) of the Act.

Conclusions of law

1. The Company, Ryder Student Transportation Services, Inc., is an Employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

**166**

2. by interrogating employees regarding their Union activities the Company has engaged in unfair labor practices in violation of Section 8(a)(1) of the Act.

3. By discharging its employee Tritschler on April 9, 1999, the Company has engaged in unfair labor practices in violation of Section 8(a)(3) and (1) of the Act.

4. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

Remedy

Having found the Company has engaged in certain unfair labor practices I find it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Company, having discriminatorily discharged its employee Tritschler, I recommend he, within fourteen days from the date of this Order, be offered full reinstatement to his former job, or if his job no longer exists to a substantially equivalent position without prejudice to his seniority or any other rights or privileges previously enjoyed and make him whole for any loss of earnings or other benefits suffered as a result of the discrimination against him with interest.

Back pay shall be computed in accordance with *F.W. Woolworth, Co.*, 90 NLRB 289 (1950), and interest shall be computed in accordance with *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

**167**

I will, in my certification of the transcript pages constituting my decision, formalize a specific Order and I shall also prepare and attach thereto a Notice to Employees that shall be posted by the Company at that time.

It is my understanding that the Court Reporting Service will provide me a copy of the transcript within ten working days of today. As soon as I have received a copy of the transcript and am available to do so I will certify those pages of the transcript that constitute my decision. I will make corrections thereto if necessary, will attach the Order and the Notice that I have spoken about.

It is my understanding that the appeal period to take exceptions to this decision runs from that time, but please use the Board's Rules And Regulations as your guidelines and not my understanding of them.

I will certify the decision as reasonably soon as I can after I have received the transcript.

It has been a pleasure to be in Columbia, Missouri, and this trial is closed.

(Off the record.)

(Whereupon the hearing in the above entitled matter was closed Tuesday, January 11, 2000, at 3:53 p.m.)